No. 10027

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

ROSETTA ALICE KELLEY, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

APPELLANT'S REPLY BRIEF

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FOREWORD

The principal purpose of this reply brief is to answer the appellee's contentions based upon the trial court's charge to the jury (R. 171–188) and the deposition of Richard B. Posey (R. 191–230), neither of which, except for small portions of Mr. Posey's deposition (R. 90–107) (in effect conceded by the appellee to be immaterial (Br. 7)), were in the record as printed and filed in this Court when the Government's original brief was filed. (They were added later pursuant to stipulations (R. 169–170, 189) which were sought by the appellee after she had previously stipulated that the portions of the deposition in the original record were sufficient (R. 168). Under the circum-

stances the appellee is scarcely justified in her statement that the Government "ignores" Mr. Posey's deposition (Br. 2)).

THE APPELLEE'S CONTENTIONS AS TO KNOWLEDGE ON THE PART OF THE INSURANCE SECTION OF THE FALSITY OF KELLEY'S REPRESENTATIONS THAT HE HAD NOT APPLIED FOR COMPENSATION OR PENSION ARE WITHOUT MERIT

There is no merit, we submit, in the appellee's contentions that the evidence justified a finding that the Insurance Section, before approving Kelley's application for insurance, made an investigation and knew (1) that his negative answers to the questions as to whether he had ever applied for compensation or pension were false and (2) that the Government doctors had discovered the aortitis and syphilis (Br. 9). The existence of those diseases was manifestly inconsistent with good health required by the statute. And the presumption of regularity of official acts would preclude a finding, in the absence of substantial evidence to support it, that the Insurance Section had approved the application without further investigation or examination, with knowledge that the reports of examinations made by a medical board of Government physicians and of a laboratory finding disclosed the existence of such diseases less than seven months previously.

The appellee's contention that her position is supported by Mr. Posey's deposition will not bear analysis. The deposition contains nothing to justify an inference that the Insurance Section, at the time in question, was in fact aware of the discovery of the diseases or even that it was aware that Kelley had

applied for compensation. Mr. Posey deposed in this connection that the Insurance Section was instructed to rely on the answers in an application for insurance (R. 199). In the instant case these included, of course, the negative answers to the questions as to whether Kelley had ever applied for compensation, training allowance, Government insurance, or pension (R. 58). There is no reason to infer that knowledge on the part of the Insurance Section of the existence of a "C" number for Kelley would put them on notice that any of the answers were false. As Mr. Posey in effect deposed, the existence of a "C" number for a person showed merely that there was a "C" file for him in the Central Office of the Veterans' Administration at Washington "whether or not it was compensation or what not" (R. 218). Compensation, training allowances, insurance, or pensions (disability allowances) are not the only benefits which a World War veteran was eligible to claim. He might, for example, merely have sought dental treatment for which the statute also provided (Act of August 9, 1921, c. 57, sec. 13, 42 Stat. 147, 152, World War Veterans' Act, 1924, as amended, sec. 202 (r), 38 U. S. C. A. 483).

The appellee, moreover, has misinterpreted Mr. Posey's deposition to the effect that it was "quite probable" that a copy of the physical examination of October 1931, was on file with the Insurance Section before it approved the insurance application (Br. 6, 33). Mr. Posey deposed in this connection merely that it as "quite possible" that a copy of the report was in the "C" file at that time. He used the phrase

"quite probable" only in adding that if an award of benefits had been made, it was "quite probable it had been received by this time" (R. 220–221). No award of benefits had been made to Kelley. Both of his claims had been disallowed. It is submitted that Mr. Posey obviously did not mean that, in the absence of an award of benefits, there was more than a possibility that a copy of the report had reached Washington at the time in question. In any event, he deposed that he did not think that the Insurance Section "drew the C file" (R. 217).

Moreover, the court instructed the jury to the effect that even if the report were in the file concerning the claim for compensation, knowledge of its contents was not to be imputed to the Director in passing on the application for insurance (R. 184). The appellee, moreover, did not except to this instruction and, under the principle which she herself invoked (Br. 1, 12–15), the rule of law applied by that instruction became the law of the case. In any event, the instruction is wholly in accord with the principle announced by this Court in *United States* v. *Riggins,* 65 F. (2d) 750, rehearing denied July 1933 which, as stated in the Government's original brief (p. 14), has been applied in other cases where the facts were substantially identical with those in the instant case. In the *Riggins* case it was said (p. 751) that the plaintiff "deliberately and intentionally made a false statement in his own behalf to secure an advantage over the Government of the United States. There is no reason why he should be heard to say that the government did not rely upon

his statements." It would seem manifest that the same rule is equally applicable to the appellee in the instant case.

THERE IS NO MERIT IN APPELLEE'S CONTENTION TO THE EFFECT THAT THE GOVERNMENT IS PRECLUDED FROM MAINTAINING ITS CONTENTIONS BY THE COURT'S CHARGE TO THE JURY TO WHICH NO EXCEPTION WAS TAKEN

The appellee appears to contend that the Government is precluded from urging that the denial of its motion for a directed verdict was erroneous by the court's instructions to the jury in regard to presumptions to which no exception was taken by either party (Br. 24). It is submitted, however, that the trial court, having denied the motion for a directed verdict, had no occasion to and did not include in its instructions to the jury any rule of law relating to the effect of a presumption applicable to its ruling on the motion. The portion of the charge upon which the appellee chiefly relies, to the effect that the presumptions of innocence of crime or wrongdoing on the part of Kelley and of fairness and regularity in his transactions with the Government were "evidence," was manifestly not intended by the court as the announcement of a rule that such presumptions themselves constituted evidence sufficient alone to take the case to the jury. For the court made it clear that such a presumption "remains as evidence in the case" only until "rebutted by a preponderance of contrary evidence" and that it "disappears * * * if the defendant produces sufficient evidence to preponderate against it." If, however, the meaning of the instruction were left in doubt in this connection, it should be construed in favor of the Government, since no such force and

effect as that urged by the appellee may be given to such a presumption in determining the sufficiency of the evidence to present a jury question in a case where, as here, the determination of that question involves the construction of a federal statute. In the instant case, the question presented by the motion for a directed verdict was whether the evidence compelled a finding of fraud, within the meaning of the provision in Section 307, World War Veterans' Act, 1924, as amended, 38 U. S. C. 518, that "policies of insurance * * * shall be incontestable * * * except for fraud, * * *." Contrary to the view apparently urged by the appellee, the effect of the presumptions in question in that connection is not governed by local statutes or decisions but by federal law. In *Prudence Realization Corporation* v. *Geist,* No. 757, October Term 1941, decided April 27, 1942, 62 S. Ct. 978, 982, the Supreme Court said, "In the interpretation and application of federal statutes, federal not local law applies." And see *Alameda County* v. *United States,* 124 F. (2d) 611, 616, upon which the appellee relies (Br. p. 50), in which this Court suggested that the statement in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 78 (also relied on by the appellee (Br. 50)) that there "is no federal general common law" was too broad because it was apparent from previous decisions of the Supreme Court that such law applies where a federal statute controls.[1] That federal, not local, law is ap-

[1] A similar view was expressed by Mr. Justice Jackson in a concurring opinion in *Doench, Duhme & Co. Inc.* v. *F. D. I. C.*, 315 U. S. 447, 469, et seq. which, it will be noted, was decided prior to *Prudence Realization Corporation* v. *Geist, supra.*

plicable in determining the sufficiency of the evidence to present a jury question in a war-risk insurance case where, as here, the Government's defense is based upon fraud, is further shown by the recent decision of the Supreme Court in *Pence* v. *United States,* No. 665, October Term, 1941, decided May 11, 1942, 316 U. S. 332, 62 S. Ct. 1080, in which it was held that statements, as in the instant case, made by the deceased insured in conflict with the representations in his application for insurance, compelled the conclusion that he had obtained his insurance by fraud and required the direction of a verdict in favor of the Government. It should be noted, moreover, that the decision in that case disposed of a contention, similar to one made by the appellee in the instant case (Br. 9, 41, 42) that conflicts between representations in the application for insurance and representations in the insured's claims for compensation and other benefits presented a question for the jury as to which of the conflicting representations were true.

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